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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 ROBERT MITCHELL,

12 Plaintiff,

13 v.

14 CORRECTIONAL OFFICER GILBERT, *et*
15 *al.*,

16 Defendants.
17

Case No. C09-5080BHS/JRC

REPORT AND
RECOMMENDATION

NOTED FOR:
March 12, 2010

18 This Civil Rights Action filed pursuant to 42 U.S.C. § 1983 has been referred to the
19 undersigned Magistrate Judge pursuant to Title 28 U.S.C. §§ 636(b)(1)(A) and 636(b)(1)(B) and
20 Local Magistrates' Rules MJR 1, MJR 3, and MJR 4. Before the court is plaintiff's motion for
21 default (Dkt. # 57). The court has considered the file and no defendant is in default. Therefore,
22 the motion should be DENIED. Since granting a motion for default would be dispositive, this
23 motion is the subject of a Report and Recommendation, rather than an order.
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2 DISCUSSION

3 Local Rule CR 55 states:

4 (a) Entry of Default

5 Upon motion by a party noted in accordance with CR 7(d)(1) and supported by
6 affidavit or otherwise, the clerk shall enter the default of any party against whom
7 a judgment for affirmative relief is sought but who has failed to plead or
8 otherwise defend. The affidavit shall specifically show that the defaulting party
9 was served in a manner authorized by Fed. R. Civ. P. 4. A motion for entry of
10 default need not be served on the defaulting party. However, in the case of a
11 defaulting party who has entered an appearance, the moving party must give the
12 defaulting party written notice of the requesting party's intention to move for the
13 entry of default at least five judicial days prior to filing its motion and must
14 provide evidence that such notice has been given in the motion for entry of
15 default.

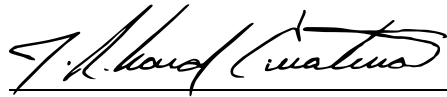
16 On September 23, 2009, the court ordered the Marshal's Service to attempt service by
17 mail (Dkt. # 51). Documents requesting waiver of formal service were not mailed until
18 sometime in November of 2009. When a party agrees to accept service by mail, the party is
19 given 60 days to file an answer. See Fed. R. Civ. P. 4 (c) (3). On December 4, 2010 All
20 defendants filed an answer on January 11, 2010 (Dkt. # 55). Plaintiff moved for default on
21 January 15, 2010 (Dkt. # 57).

22 Thus, since all defendants filed an answer within 60 days of accepting service by mail, no
23 defendant was in default and the motion should be DENIED.

24 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil
25 Procedure, the parties shall have fourteen days (14) days from service of this Report and
26 Recommendation to file written objections. See also Fed. R. Civ. P. 6. Failure to file objections
will result in a waiver of those objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140

1 (1985). Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the
2 matter for consideration on March 12, 2010, as noted in the caption.

3 Dated this 17th day of February, 2010.

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7 J. Richard Creatura
8 United States Magistrate Judge
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